LIBRARY

Office-Supreme Court, U.S.
FILED
JUL 18 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 163

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Petitioners,

v.

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID I. SHIVITZ
Counsel for Respondents
271 Madison Avenue
New York 16, N. Y.

July 19, 1961

INDEX

PAGE

Questions Presented 1

Statement of the Case 2

Argument 6

I—The injunction judgment sought to be here reviewed was fully warranted, and its unanimous affirmance by both the Appellate Division and the New York Court of Appeals was eminently correct 7

1. The subject matter, issues, parties, and relief prayed for in both actions were essentially the same 8

2. The two actions being basically the same, the injunction was properly granted 10

3. The purpose of the injunction was not to enforce the underlying New York judgment but to forestall an attempt at its nullification by a vexatious suit brought in a foreign jurisdiction 12

II—The underlying New York judgment did not impinge upon any principle of Connecticut's public policy and, judged by every legal criterion, is final and conclusive upon the parties 13

1. The New York courts did not usurp any of the "sovereign rights" or "exclusive prerogatives" of the Connecticut courts 16

PAGE

2. The counterclaim for the declaratory judgment was properly entertained by the New York court 17

3. The declaratory judgment in the underlying New York action was not granted in the abstract or in a factual vacuum. Nor was any so-called "consequential relief" requisite for its issuance 18

4. Petitioners' arguments on the "quorum issue" are without valid basis and were fully considered by the New York courts 20

III—The injunction judgment did not deprive petitioners of any property without due process of law, or deny them the equal protection of the laws. Nor was this question properly raised by petitioners before the Courts below 22

1. Petitioners have not been deprived of any constitutional rights 22

2. The Federal question relied upon by Petitioners was not properly raised before the Courts below 23

IV—The Federal question sought to be presented is of no general or public importance 24

Conclusion 25

Appendix 26

Citations

Cases: PAGE

Aghnides v. *Aghnides*, 150 N.Y.S. 2d 371 11
Benedict v. *Hall Mfg. Co.*, 211 Iowa 1312, 236 N.W. 92 11
Bloomquist v. *Farson*, 222 N.Y. 375, 118 N.E. 855 17
Carpenter v. *Osborne*, 102 N.Y. 552, 7 N.E. 823 17
Cole v. *Cunningham*, 133 U.S. 107, 10 S. Ct. 269 ..... 12, 22, 25
E. B. Latham & Co. v. *Mayflower Industries*, 278 A.D. 90, 103 N.Y.S. 2d 279 11
Ferguson v. *Village of Hamburg*, 272 N.Y. 234, 5 N.E. 2d 801 17
Field v. *Holbrook*, 3 Abb. Prac. 377 10
Gaunt v. *Nemours Trading Corp.*, 194 A.D. 668, 186 N.Y.S. 92 11
H. B. Claflin & Co. v. *Hamlin*, 62 How. Prac. 284 11
Locomobile Co. v. *American Bridge Co.*, 80 A.D. 44, 80 N.Y.S. 288 11
Matter of Shea, 309 N.Y. 605, 132 N.E. 2d 864.. 9
National City Bank v. *Beebe*, 131 N.Y.S. 2d 67, affd. 285 A.D. 874, 139 N.Y.S. 2d 238 11
Oates v. *Morningside College*, 217 Iowa 1059, 252 N.W. 783 11
O'Haire v. *Burns*, 45 Colo. 432, 101 P. 755 11
Paramount Pictures v. *Blumenthal*, 256 A.D. 756, 11 N.Y.S. 2d 768 11
Persky v. *The Bank of America Nat. Ass'n*, 261 N.Y. 212 14

PAGE

Rothschild v. *Naamlooze Vennootschap G.P.T.*, 194 Misc. 479, 87 N.Y.S. 2d 189 11

Steele v. *Bulova*, 344 U.S. 280, 73 S. Ct. 262 ... 11

Steelman v. *All Continent Corp.*, 301 U.S. 278, 57 S. Ct. 705 12

Tomlinson v. *Loew's, Inc.*, 134 Atl. 2d 518, affd. 135 Atl. 2d 136 (Chancellors' Court of Delaware, not officially reported) 20

Vail v. *Knapp*, 49 Barb. 299 .....10, 11

Webster v. *Columbian Nat'l Life Ins. Co.*, 131 A.D. 837, 116 N.Y.S. 404 11

Wehrhane v. *Peyton*, 134 Conn. 486, 58 Atl. 2d 698 11

Westchester Mortgage Co. v. *Grand Rapids & I.R. Co.*, 246 N.Y. 194, 158 N.E. 70 .....12, 17

Williams v. *Green Bay & W. R. Co.*, 326 U.S. 549, 66 S. Ct. 284 17

Statutes:

Connecticut Corporation Laws, Sec. 5165 .. 20, 21

New York Civil Practice Act, Sec. 473 19

United States Constitution, Article IV, Secs. 1 and 2 22

United States Constitution, Article V of Amendments 2, 22

United States Constitution, Article XIV,, Sec. 1 of Amendments 2, 22

Miscellaneous:

Joyce, Howard C.—A Treatise on the Law Relating to Injunctions, Volume I, Sec. 77 .. 12

30 Corpus Juris Secundum, Sec. 67, page 414 .. 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 163

JOSEPH MOOK, LEONARD MOOK, SYLVIA MOOK, DAVID MOOK, DANIEL MOOK and JOSEPH MOOK and LEONARD MOOK as Executors of the Estate of Morris Mook, Deceased,

Petitioners,

v.

SAMUEL S. BERGER, SADIE BERGER, HARRY MERDINGER, MILDRED MERDINGER, ARTHUR MERDINGER, HARVEY L. OSTROVER, LILA P. OSTROVER and THE AMERICAN FABRICS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

Petitioners originally commenced an action against the individual Respondents in New York which, after trial, resulted in a judgment adverse to Petitioners.

Dissatisfied with that judgment, they started a second action against Respondents in Connecticut seeking to relitigate substantially the same issues. Thereupon, Respondents obtained the judgment sought to be here reviewed, enjoining Petitioners from prosecuting their Connecticut action. Since the judgment in the original action, unanimously affirmed by the New York Court of Appeals more than two years ago, is final and conclusive upon the parties and not subject to review at this time, the only questions here presented are:

1. Whether, by reason of the granting of the injunction judgment sought to be reviewed, Petitioners were deprived of any property without due process of law or denied the equal protection of the laws, in violation of either Article V or Article XIV, Section 1, of the Amendments to the Constitution of the United States.

2. Whether this constitutional question was properly raised by Petitioners before the courts below.

Statement of the Case

By letter of February 27, 1958, the individual Respondents, owners of 50.22% of the outstanding stock of The American Fabrics Company (AFC), notified Petitioners, the owners of the balance of AFC's outstanding stock, that because of the manner in which Petitioner Leonard Mook had conducted certain negotiations on behalf of AFC, they would refuse to vote for his reelection as a director of AFC, and would demand his discharge as AFC's general counsel (Buff. 343).

On April 1, 1958, Petitioners (including Morris Mook who was then living) instituted an action in the New York Supreme Court for an injunction directing Respondents to comply with the terms of a stockholders' agreement entered into in 1953 among the parties (1) by voting for the reelection of Leonard Mook as a director of AFC in accordance with the provisions of said agreement, and (2) by taking no action to discharge the said Leonard Mook as general counsel of AFC without the concurrence of at least six of AFC's seven directors, as called for by said 1953 agreement (Buff, 34-35) and as provided in a by-law amendment adopted pursuant thereto (Buff, 74-75). A copy of the agreement was annexed to their complaint (Buff, 23).

All six plaintiffs in that action (Petitioners herein) were residents of New York. All seven defendants (the individual Respondents herein) were likewise residents of that state (Buff, 20). Although AFC was a Connecticut corporation, it was qualified to do business in New York and maintained an office and salesroom in New York City (Buff, 20). The parties to the action (Petitioners and the individual Respondents) included all of the stockholders of AFC (Buff, 21), all of the then directors of AFC, and all of the signatories to the 1953 agreement (Buff, 274). The agreement was entered into in New York City (Buff, 22). The by-law providing for a 6/7ths vote of directors for effective Board action, was adopted at a stockholders' meeting held at AFC's office in New York City (Gray, 262). As shown above, Petitioners selected New York as the forum for their action.

In that action, Respondents (as defendants) interposed (1) a complete defense alleging gross misfeasance and breach of trust by Leonard Mook against AFC, (2) a partial defense alleging the invalidity of the provision in the 1953 agreement, and the by-law adopted pursuant thereto, requiring a 6/7ths vote of AFC's directors for effective Board action, and (3) a counterclaim for a judgment declaring such provision in the agreement, and the by-law adopted pursuant thereto, to be void and invalid (Gray, 38-39).

At the trial of the action in May 1958, Petitioners (as plaintiffs) offered no testimony, contended that only questions of law were presented, and merely introduced various pertinent documents, including the 1953 agreement on which the action was based, the aforesaid letter of February 27, 1958, and AFC's by-laws (Buff, 170-174). Later in the trial, Petitioners judicially admitted "for the purposes of this case only" Leonard Mook's gross misfeasance and breach of trust as alleged in Respondents' answer (Buff, 195). As part of their case, Respondents introduced evidence in support of their contention that the provision in the agreement, and the by-law adopted pursuant thereto, calling for a 6/7ths vote of directors, were void and invalid (Buff, 198-205).

In a formal decision after trial, the Court found Leonard Mook guilty of the gross misfeasance and breach of trust alleged against him, and further found the challenged provision of the agreement to be "void and unenforceable", and the by-law adopted pursuant thereto to be "wholly invalid and inoperative" (Buff, 97-98). On June 17, 1958, judgment was duly entered dismissing Petitioners' complaint in that

action and granting judgment to Respondents declaring the agreement provision and by-law in question to be invalid, void and inoperative (Buff. 113-116).

On appeal to the New York Appellate Division, the judgment was affirmed, with one justice dissenting only as to the granting of the declaratory judgment on Respondents' counterclaim (7 App. Div. 2d 726). On further appeal to the New York Court of Appeals, the judgment was unanimously affirmed in June 1959 (6 N. Y. 2d 833). No subsequent proceedings were ever taken for a further review of that judgment. Nor was any application made to this Court for a writ of certiorari with respect thereto.

While the appeal to the New York Appellate Division was pending, Petitioners (as plaintiffs) instituted another action against the individual Respondents in the Superior Court of Connecticut, this time joining AFC and one, Harold Bechtel, an AFC employee, as additional defendants (Gray 49). Basing their claims on the very same provisions of the 1953 agreement (Gray, 201-204) and the very same by-law adopted pursuant thereto (Gray, 204-205), Petitioners asked for (i) an injunction restraining Respondents from holding directors' meetings "with a quorum of less than six (6), at which a vote of less than six (6) shall be required for action"; (ii) an injunction restraining Respondents from violating the terms of the 1953 agreement; and (iii) specific performance of the 1953 agreement (Gray, 212-213). Their complaint was subsequently amended to include a fourth claim for relief — "$200,000.00 damages" without specifying any basis for that claim (Gray, 260).

Claiming that this second action was vexatious in that it involved essentially the same parties as the prior New York action and substantially the same issues that had already been there tried and determined (Gray, 52), Respondents commenced an action in the New York Supreme Court for an injunction restraining Petitioners from further prosecuting their Connecticut action (Gray, 56). On Respondents' motion, a temporary injunction was granted against Petitioners (Gray, 21-22). The order granting that injunction was unanimously affirmed by the New York Appellate Division (8 App. Div. 2d, 793). Petitioners' motion for leave to appeal to the New York Court of Appeals was denied (9 App. Div. 2d, 616). Thereafter, on Respondents' motion, summary judgment was granted permanently enjoining Petitioners from further prosecuting their Connecticut action (Blue, 13). That judgment was likewise unanimously affirmed by the New York Appellate Division (10 App. Div. 2d, 917). On appeal to the New York Court of Appeals, leave having been granted, the judgment was again unanimously affirmed (9 N.Y. 2d, 805). It is with respect to that judgment of affirmance that the within petition for a writ of certiorari has been filed.

Argument

Petitioners have filed what is more in the nature of a brief on the merits. And not content with dwelling on the merits of the judgment sought to be here reviewed, and the federal question which they claim is here presented, Petitioners devote the bulk of their petition to a reargument of the propriety

of the underlying New York judgment—repeating and rehashing virtually every argument unsuccessfully urged by them before the highest Court of the State of New York more than two years ago, without any subsequent plea having been made for further review or for a writ of certiorari by this Court.

Accordingly, while our argument in this opposing brief will confine itself essentially to the propriety of the judgment sought to be reviewed, to its claimed effect on Petitioners' constitutional rights, and to the importance of the federal questions sought to be raised in the petition, we are compelled to deal, to some extent, with Petitioners' arguments as to the underlying New York judgment.

I

The injunction judgment sought to be here reviewed was fully warranted, and its unanimous affirmance by both the Appellate Division and the New York Court of Appeals was eminently correct.

The injunction judgment was properly granted because—

a) the subject matter, issues, parties, and relief prayed for in the Connecticut action were essentially the same as those in the prior New York action;

b) all of the parties to the prior New York action were residents of the state of New York, and the litigation was originally instituted in the courts of that state; and

c) the purpose of the injunction was not to enforce the underlying New York judgment, but to forestall

an attempt at its nullification by a vexatious suit brought in a foreign jurisdiction to relitigate issues already determined in New York.

1. The subject matter, issues, parties, and relief prayed for in both actions were essentially the same.

Both actions involved the very same stock interests of the parties in AFC. Both were based upon the very same provisions of the 1953 agreement (Buff, 323—Gray, 201; Buff, 324—Gray, 202) and the by-law adopted pursuant thereto (Buff, 356—Gray, 266).

In the New York action Leonard Mook's misconduct had been one of the principal issues (Buff, 83). Since the complaint in the Connecticut action alleged a breach of the 1953 agreement "by failing to elect a Board of Directors as provided therein" (Gray, 211), and since the only failure to comply with the agreement in that respect was the non-election of Leonard Mook (Blue, 51-52), the very same issue as to Leonard Mook's misfeasance and breach of trust was tendered in the Connecticut action.

In the New York action the issue as to the validity of both the provision in the agreement and the by-law adopted pursuant thereto calling for a 6/7ths vote of directors, was raised by the defense that the agreement provision and by-law were invalid (Buff, 48) and by the counterclaim for a declaratory judgment to that effect (Buff, 49-64, 66). The very same issue was tendered in the Connecticut action since, under each of the three counts of their complaint in that action, Petitioners alleged a breach of the same pro-

vision of that agreement and of the same by-law (Gray, 206, 208, and 210).

The six plaintiffs (Petitioners herein) in the prior New York action, who themselves originally invoked the jurisdiction of that forum, were the very same six plaintiffs who commenced the subsequent Connecticut action. All of the seven defendants in the prior New York action were named as defendants in the subsequent Connecticut action. Two additional, but unessential, defendants were also joined by Petitioners—namely, The American Fabrics Company and Harold Bechtel. The joinder of Bechtel was of no significance. He was neither a stockholder nor a director of AFC. Nor was he a signatory to the 1953 agreement. As to the joinder of AFC, we again point out that the parties to the prior New York action comprised all of the AFC stockholders and included all who were then directors of AFC as well as all who were signatories to the 1953 agreement. In the language of the holding in *Matter of Shea*, 309 N.Y. 605, Respondents should not be "permitted to use the corporate cloak as a means to avoid the finality of the former adjudication" where, as here, all of the stockholders "have appeared and participated in the prior action which resulted in an unfavorable adjudication".

Finally, the relief prayed for in both actions was essentially the same. In the New York action, Petitioners had sought a mandatory injunction in effect compelling Respondents to vote for the reelection of Leonard Mook in compliance with the 1953 agreement (Buff, 34, 35). In the Connecticut action, petitioners sought specific performance of the 1953

agreement (Gray, 213) after alleging Respondents' breach thereof "by failing to elect a Board of Directors as provided therein" (Gray, 211). Since the non-election of Leonard Mook was the only deviation from the provisions of the 1953 agreement (Blue, 51-52), Petitioners, in Connecticut could only be seeking to reelect Leonard Mook as an AFC director—precisely what they had sought to accomplish in the prior New York action.

As can be seen from the foregoing, the purpose of Petitioners' Connecticut action was not only to relitigate the issues raised by Respondents' counterclaim, but to retry virtually all of the issues raised, tried, and determined against them in the prior New York action.

2. The two actions being basically the same, the injunction was properly granted.

All the parties to the prior New York action were residents of the state of New York; the litigation was originally instituted in the courts of that state; and the subsequent action, involving essentially the same issues, was brought in a jurisdiction foreign to the state of New York, to wit, Connecticut.

Under these circumstances, it has long been established that the subsequent suit would be deemed vexatious and that an injunction could properly issue to enjoin the parties seeking to maintain such suit from proceeding with its prosecution. This principle of law is supported by a long line of New York cases extending over the past century. *Field* v. *Holbrook*, (1856) 3 Abb. Prac. 377; *Vail* v. *Knapp*, (1867) 49

Barb. 299; *H. B. Claflin & Co.* v. *Hamlin*, (1881) 62 How. Prac. 284; *Locomobile Co. of America* v. *American Bridge Co.*, (1903) 80 N.Y.S. 288, 80 App. Div. 44; *Webster* v. *Columbian Natl. Life Ins. Co.*, (1909) 116 N.Y.S. 404, 131 App. Div. 837; *Gaunt* v. *Normours Trading Corp.*, (1921) 194 App. Div. 668, 186 N.Y.S. 92; *Paramount Pictures* v. *Blumenthal*, (1939) 256 App. Div. 756, 11 N.Y.S. 2d 768; *Rothschild* v. *Naamlooze Venootschap G. P. T.*, (1949) 87 N.Y.S. 2d 189, 194 Misc. 479; *E. B. Latham & Co.* v. *Mayflower Industries*, (1951) 103 N.Y.S. 2d 279; 278 App. Div. 90; and *National City Bank of New York* v. *Beebe*, (1954) 131 N.Y.S. 2d 67, affirmed 139 N.Y.S. 2d 238, 285 App. Div. 874.

It is a coincidence that one of the leading decisions in this branch of the law is that of the highest court in the state of Connecticut *Wehrhane* v. *Peyton*, 134 Conn. 486, 58 Atl. 2d 698. Moreover, while such an injunction may be granted even before the prior action is determined, it is also quite appropriate—if not more so—where, as here, the issues in the prior action had already been adjudicated—and even though the plea of *res judicata* was available in the subsequent action. *Aghnides* v. *Aghnides*, 150 N.Y. Supp. 2d 371, *O'Haire* v. *Burns*, 45 Colo. 432, 101 P. 755; *Wehrhane* v. *Peyton*, supra; *Benedict* v. *Hall Mfg. Co.*, 211 Iowa 1312, 236 N.W. 92; and *Oates* v. *Morningside College*, 217 Iowa 1059, 252 N.W. 783.

Of course, the injunction granted below was not directed against the courts of Connecticut, but against the six individual plaintiffs in the action (Petitioners here), all of whom were residents of the state of New York. *Vail* v. *Knapp*, 49 Barb. 299, 308; *Steele*

v. *Bulova*, 344 U.S. 280; *Steelman* v. *All Continent Corp.*, 301 U.S. 278, 291.

As stated by Joyce in his work on Injunctions, Volume I, Section 77:

> "Though the courts of one state or country have no authority to control proceedings in the courts of another, they can control all persons and things within their own territorial limits, and if both parties to a suit in a foreign country reside within the territory of another, courts of equity in the latter may act *in personam* upon them and enjoin them from proceeding further in the suit." (citing Story, Eq. Jur. Secs. 899, 900, as adopted by the court in *Cole* v. *Cunningham*, 133 U.S. 107).

3. The purpose of the injunction was not to enforce the underlying New York judgment but to forestall an attempt at its nullification by a vexatious suit brought in a foreign jurisdiction.

In their petition, Petitioners contend that the New York courts, by granting the injunction judgment sought to be reviewed, were in effect enforcing the New York declaratory judgment beyond the territorial limits of that state, and cite *Westchester Mortgage Co.* v. *Grand Rapids & Iona R. Co.*, 246 N.Y. 194, 158 N. E. 70, as authority barring any such enforcement. That case is readily distinguished. There, the New York judgment, of necessity, had to be enforced by a subsequent foreclosure action which, by reason of the subject matter, could be brought only in the state of Rhode Island. The New York Court

of Appeals therefore held that the courts of New York, in that case, had no right to determine an issue which would necessarily arise as an incident to the subsequent foreclosure action that would have to be brought in Rhode Island.

In the case at bar, the underlying judgment of the New York court determined an issue as part of a declaration of rights among residents of New York who had submitted to its jurisdiction, and became effective without need to resort to the courts of a foreign jurisdiction for enforcement. Thus, Respondents did not find it necessary to resort to the Connecticut courts to enforce the judgment. Nor did Petitioners start their action in Connecticut in order to enforce that judgment. Their only purpose was to vitiate Respondents' rights established thereby. Obviously, therefore, Respondents' action for the injunction was not brought to enforce the underlying judgment, but to stop Petitioners' attempt to nullify it.

II

The underlying New York judgment did not impinge upon any principle of Connecticut's public policy and, judged by every legal criterion, is final and conclusive upon the parties.

Although seemingly attacking the propriety of the *injunction judgment* sought to be here reviewed, Petitioners actually are attempting to have this Court rule on the merits of the underlying *declaratory judgment* which, unanimously affirmed by the New York Court of Appeals more than two years ago without subse-

quent application to this Court for a writ of certiorari, is final and conclusive upon the parties—and is not subject to review at this time.

In this attempt, Petitioners repeat what they have, time and again, previously urged in both the underlying and injunction actions, and try to give the impression that some of their present arguments had never been made before the New York courts—as though, if true, this would justify a retrial in Connecticut of the same *issues* that have already been determined in the underlying action.

They argue, for example, that the by-law, which referred only to *voting* requirements and which the New York court had declared to be "wholly invalid and inoperative," somehow had the effect of increasing the *quorum* requirements—and claim that this "quorum issue was never at all litigated or determined in New York"—while knowing full well that this specious *argument* had been fully presented by them to the New York Court of Appeals in the underlying action, which court was authorized to consider any question of law pertaining to the invalidated by-law before it, whether or not such question had been previously raised. *Persky* v. *The Bank of America Nat. Ass'n*, 261 N.Y. 212.

They then argue, as they previously did before the New York Court of Appeals, that because AFC's by-laws forbade an amendment thereof without the affirmative vote of at least 80% of its outstanding stock, the New York court could not properly declare the 6/7ths voting by-law invalid unless requested so to do by the holders of at least 80% of AFC's stock-

holders—thus making the preposterous claim that the court's invalidation of the by-law was tantamount to an amendment thereof by the holders of only 50.22% of AFC's stock. Clearly, if the by-law was invalid, the court had the right—if not the duty—to declare it so even if requested by the holder of only a single share.

Finally, just as they argued before the Court of Appeals in both the underlying and injunction actions, Petitioners also contend that the New York courts should not have accepted jurisdiction of Respondents' counterclaim, and should not have declared invalid the contractual and by-law provision requiring a 6/7ths vote of directors. This contention is chiefly predicated upon the following claims:

(a) the claims with respect to the so-called "quorum issue";

(b) the claim that the New York court declared "what shall be the public policy of the State of Connecticut, and, in doing so fails to enforce, honor, or give full faith and credit to Connecticut's public acts and statutory law"; and

(c) the claim that the New York declaratory judgment was granted in the abstract because it did not grant so-called "consequential relief."

1. The New York courts did not usurp any of the "sovereign rights" or "exclusive prerogatives" of the Connecticut courts.

The declaratory judgment was not intended to, nor did it, have the effect of declaring, establishing or changing any public policy of Connecticut. It was strictly a declaration of the respective rights of the parties to the action, all residents of New York, under an agreement made in New York, with respect to a by-law adopted in New York pursuant thereto, of a Connecticut corporation of which they were the sole stockholders.

Like any other rule of law of a foreign jurisdiction, Connecticut's public policy on the question presented was a matter which the New York courts had the right to look into and determine—not as to what the New York courts thought such public policy should be, but as to what it actually was, as already established by those who had the right to do so. The New York courts could thus determine what was the applicable Connecticut law, as well as its applicable public policy, either on the basis of proof as a question of fact or by taking judicial notice thereof, and then apply its findings in this respect to the adjudication of the issues presented in the action before it. The trial court in the underlying action took judicial notice of the applicable Connecticut laws. In addition, Respondents gave proof thereof by the testimony of a Connecticut lawyer and by introducing a copy of the Corporation Laws of Connecticut (Buff. 198-205).

In the very case relied on by Petitioners, *Westchester Mortgage Co.* v. *Grand Rapids & Ionia R. Co.*, supra, the New York Court of Appeals stated:

> "that when appeal is made to our courts for relief in a matter of which they have jurisdiction, they may, of course, determine as a question of fact what is the law of a foreign jurisdiction and then decree relief in accordance with the law so found."

This is also the rule in the Federal courts, even with respect to the most difficult question of corporate law, *Williams* v. *Green Bay and W. R. Co.*, 326 U.S. 549.

2. The counterclaim for the declaratory judgment was properly entertained by the New York court.

Petitioners concede that in the underlying action the New York court properly took jurisdiction of the cause of action alleged in their complaint, but contend that it was improper for the court to accept jurisdiction of Respondents' counterclaim. However, it has long been the established rule that a court of equity which has obtained jurisdiction of a controversy on any ground, for any purpose, should retain jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter. *Ferguson* v. *Village of Hamburg*, 272 N.Y. 234, 239; *Carpenter* v. *Osborne*, 102 N.Y. 552; *Bloomquist* v. *Farson*, 222 N.Y. 375, 380; and *30 C.J.S. Sec. 67*, page 414, where literally hundreds of other authorities are cited.

This rule was especially applicable in the underlying suit. Not only did Petitioners select New York as the forum for their action but, by electing not to reply to Respondents' counterclaim, they also judicially admitted the facts alleged therein and thereby, in effect, joined Respondents (a) in asking the court to take jurisdiction of the counterclaim on the grounds that "a valid dispute has arisen * * * as to the validity and enforceability of the above referred to provision of the July 9, 1953 agreement, as to the validity of the by-law adopted pursuant to such provision * * *, and as to whether or not the Board of Directors of The American Fabrics Company, acting by a majority of a quorum at a meeting of such Board duly convened, has the power and authority to discharge the plaintiff Leonard Mook as general counsel for the company" (Buff. 61-62); and (b) in telling the court that unless this dispute was "adjudicated *in this action*, irreparable harm will result in that * * *". (Buff. 64; italics supplied.)

Moreover, at the trial, Petitioners' counsel, not only did not object to the court's taking jurisdiction of Respondents' counterclaim, but insisted that the case presented only a question of law "which I am happy to leave to your Honor's determination" (Buff. 160).

3. The declaratory judgment in the underlying New York action was not granted in the abstract or in a factual vacuum. Nor was any so-called "consequential relief" requisite for its issuance.

In that action, Petitioners' prayer for an injunction was itself based upon the 6 7ths voting provision in the 1953 agreement and the by-law adopted there-

under. Thus, it was Petitioners' prayer that Respondents be enjoined from taking any action to discharge Leonard Mook as AFC's general counsel "without the concurrence of at least six directors of AFC" (Buff. 35). In opposing this, Respondents had alleged as a defense the gross misfeasance and breach of trust charged against Leonard Mook. It was in this factual and moral setting that the declaratory judgment was granted, thereby removing for Respondents the procedural obstacle that Petitioners had sought to interpose against Leonard Mook's discharge.

Petitioners concede the fundamental rule of law which recognizes "the undoubted right and duty of a State court to apply foreign law" in resolving issues properly before it. However, Petitioners make the invalid and unsupported assertion that this "undoubted right and duty" may not be exercised in an action for a declaratory judgment where a request for "consequential relief" is lacking. Petitioners' claim is completely refuted by Section 473 of New York's Civil Practice Act, which gives its Supreme Court the power to grant declaratory judgments "whether or not further relief is or could be claimed."

Actually, the declaratory judgment did award "consequential relief" by making it possible for Respondents to discharge Leonard Mook as counsel, notwithstanding Petitioners' attempt to interpose the 6 7ths voting requirement as a barrier.

4. Petitioners' arguments on the "quorum issue" are without valid basis and were fully considered by the New York courts.

There is no basis whatever for Petitioners' claim that full faith and credit were not given to Connecticut's Public Acts. The briefs submitted to the New York Court of Appeals in the underlying suit by both Petitioners and Respondents were replete with citations of, and extracts from, Connecticut statutes and cases—and fully debated the claims Petitioners repeat here.

In the forefront then, as now, it was their claim that because Section 5165 of the Corporation Laws of Connecticut was amended *in 1957* so as to permit a *quorum* greater than a majority, the New York court should have decided that the 1953 by-law in question, which referred only to *voting* requirements, nevertheless had the effect of increasing the *quorum* requirements.

Petitioners' contention is thus based upon the wording of Section 5165 following its amendment in 1957 when, *for the first time*, Connecticut corporations were authorized to fix a quorum of directors at *more* than a majority. Petitioners persist in ignoring the fact that the by-law was adopted *in 1953*—not in 1957—and that its validity must be judged on the basis of the law which existed when it was adopted, and not as it read some four years later. *Tomlinson* v. *Loew's, Inc.*, 134 Atl. 2d 518 affd. 135 Atl. 2d 136.

The Court in the underlying action declared that the 6 7ths voting requirement of the agreement was "void

and unenforceable" and that the by-law adopted thereunder was "wholly invalid and inoperative." This could only mean that the by-law amendment was incapable of effecting any change at all—either a change of voting or of quorum requirements. Yet, without showing by what magic this was or could be done, Petitioners keep arguing that this "wholly invalid and inoperative" by-law in which the word "quorum" does not even appear, somehow raised the *quorum* requirements to 6 7ths—despite the fact that, as confirmed by the Court of Appeals,* the AFC by-laws, both before and after the invalid and futile attempt to change their *voting* requirements, plainly provided that a *quorum* was to consist of a "majority" of directors—this being the highest requirement then permitted (in 1953) by the provisions of Section 5165 (Buff, 359—see Reporter's Memorandum, lower half of page 57 of appendix to petition).

---

* The denial of Respondents' motion for a clarification of the New York Court of Appeals no-opinion decision did not by any means indicate that "the New York courts did not decide the quorum issue at all", as Petitioners claim at page 4 of their petition. Although the motion was technically denied, the requested clarification was granted by the Court of Appeals by having the "quorum issue" elaborated upon in the Reporters' Memorandum of the affirmance of the injunction judgment (9 N.Y. 2d 805, appearing at pages 56-58 of the appendix to petition). This is clearly indicated by the letter from Mr. Raymond J. Cannon, Clerk of the New York Court of Appeals, which accompanied the galley proof of the Reporters' Memorandum (reproduced as appendix to this brief).

III

The injunction judgment did not deprive petitioners of any property without due process of law, or deny them the equal protection of the laws. Nor was this question properly raised by petitioners before the Courts below.

1. Petitioners have not been deprived of any constitutional rights.

It is well settled that where, in a proper case, citizens of a state are enjoined by the courts of that state from proceeding with the prosecution of an action brought by them in another state, there is no violation of any of their constitutional rights or immunities. Thus, Beach, in his work on Modern Equity Jurisprudence, at Section 649, states:

> "The exercise of this jurisdiction is not forbidden by the provisions of the constitution that full faith and credit shall be given judicial proceedings of other States, and that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states", citing *Cole* v. *Cunningham*, 133 U.S. 107 (1890).

While the case of *Cole* v. *Cunningham*, *supra*, deals with the constitutional privileges and immunities granted by Article IV, Sections 1 and 2, of the Constitution proper, its rationale is equally applicable to rights claimed by Petitioners under Articles V and XIV of the Amendments to the Constitution.

Petitioners complain that they have somehow been deprived of property without "due process". What greater degree of due process could have been afforded them than that which was actually availed of by them in running the gamut of the New York courts? Had Petitioners been permitted to prosecute their Connecticut action, it is Respondents who would have been deprived of due process, by being thus required to contest, once again, issues which had already been thoroughly litigated and fully and finally determined.

While citizens of each state have been given the constitutional privilege to invoke the jurisdiction of the courts of any of the several states, they have not thereby been given the right to do so in order to relitigate issues already determined in a prior action. If such were the case, the constitutional privilege would serve, not as a guarantee of due process and of the equal protection of the laws, but as a means of depriving successful litigants of those very rights.

2. The Federal question relied upon by Petitioners was not properly raised before the Courts below.

No constitutional question whatever was raised by Petitioners in the underlying action—either by their pleadings, or at the trial, or in their briefs on appeal. Moreover, since no petition for review of the judgment in that action was ever filed with this Court, all issues presented therein, whether relating to the dismissal of the complaint or to the granting of the declaratory judgment, were finally and conclusively determined.

Petitioners, nevertheless, in this proceeding seek in effect to obtain permission to have a Connecticut court

review the determination of those issues. For in their first and second defenses to Respondents' complaint in the injunction action (set forth at pages 72 to 74 of the petition) Petitioners in effect pleaded that an injunction would be improper because the *underlying* judgment was incorrect. Actually, then, the constitutional question pleaded by Petitioners is not properly raised with respect to the *injunction* judgment sought to be here reviewed, but relates to the underlying New York judgment as to which Petitioners have long since been precluded.

IV

The Federal question sought to be presented is of no general or public importance.

Petitioners make no attempt to show that the federal question upon which their petition is based has any general or public importance warranting a review by this Court. The fact is that it has none.

Petitioners argue that Connecticut's "sovereign rights" and "exclusive prerogatives" have somehow been usurped by the New York courts. But the State of Connecticut has never been a party to this litigation and couldn't possibly have been prejudiced by the underlying New York judgment. What we have here is simply a case of defeated private litigants who tried to relitigate in Connecticut the same issues that had already been determined against them in New York—and who now complain because they have been stopped from doing so.

As stated above, the judgment in the underlying action did not have any effect upon Connecticut's public policy. It was strictly a declaration of the jural rights of the parties involved in the action. This is equally true with respect to the injunction judgment sought to be here reviewed. No persons other than those who were parties to the injunction action can in any way be affected by the injunction judgment. Neither the judgment, nor any issue determined thereby, is in any way binding upon the Connecticut courts except with respect to those parties.

The federal question is not one as to which there is any conflict among the courts of the states involved. As shown above, both the courts of New York and those of Connecticut are in agreement that an injunction will lie under the circumstances that were here presented. Moreover, the federal question sought to be here presented has long since been settled by the decision of this Court in the case of *Cole* v. *Cunningham*, supra.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

David I. Shivitz
Counsel for Respondents
271 Madison Avenue
New York 16, N.Y.

July 19, 1961

APPENDIX

Letter from Mr. Raymond J. Cannon, Clerk of the New York Court of Appeals, accompanying galley proof of the Reporter's Memorandum at 9 N.Y. 2d 805.

(OFFSET)

[*For convenience of Court and Counsel this Document is bound in on the opposite page.*]

State of New York
Court of Appeals

Raymond J. Cannon
Clerk

Clerk's Office
Albany 7

June 13, 1961

Halperin, Natanson, Shivitz, Scholer & Steingut, Esqs.
Counsellors at Law
271 Madison Avenue
New York, N. Y.

Re: Berger v. Mook

Dear Sirs:

Enclosed please find a copy of the galley proof of pages 805 and 806 of volume 9 N Y 2d as they will appear when the advance sheet and bound volume are published. The court instructed this office to send you these pages in connection with the recent motion to clarify the decision to apprise you of what the Official Reports will show concerning the matters decided herein.

Very sincerely,

Raymond J. Cannon
Clerk

RJC:wb